SUPREME COURT, U.S.
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CHARLES ELMORE CROPLEY
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Nos. [redacted]
45-48

In the Supreme Court of the United States

OCTOBER TERM, [redacted] / 1950

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF INTERSTATE COMMERCE COMMISSION TO AFFIRM

In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

MOTION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal [1] from the final judgment and decree entered on January 12, 1950,[2] by a specially constituted district court of three judges

[1] Separate appeals from the District Court's decision have been filed by (1) Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and the Railroad Commission of Texas, and (2) Savannah Sugar Refining Corporation. This motion is directed to all appeals. It is apparent that if the motion is granted as respects the railroads' appeal, there is no substance or merit to the separate appeals. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; *Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

[2] The Court rendered its opinion and made findings of fact and conclusions of law on January 12, 1950.

established pursuant to Section 2284 of Title 28, United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 7, 1950, and appeal papers served on March 9, 1950.

The Commission's order dated June 13, 1949, entered in a proceeding entitled *Rail and Barge Joint Rates,* Docket No. 26712, required appellant railroads and appellee barge lines to establish through routes and joint rates for the transportation of property in joint rail-barge service.[3] (270 I. C. C. 591; 274 I. C. C. 229.)

The joint rates prescribed were designed to provide a reasonable and more flexible rate structure than that which had resulted through an evolutionary process since the inception of joint barge service and the original prescription of joint rates in 1920.

The history of rail-barge transportation on the Mississippi River and its tributaries, together with details concerning the rate structure applicable thereto prior to the entry of the instant order and reasons prompting institution of a general investigation by the Commission of rail-barge joint rates and routes, is comprehensively set forth in the Commission's report of July 7, 1948, 270 I. C. C. 591, and more succinctly, in

[3] For convenience of the various types of joint service covered by the order, such as rail-barge, barge-rail, rail-barge-rail, etc., will be referred to as rail-barge.

the opinion of the District Court sustaining the reasoning in that report.

This appeal does not challenge the statutory power of the Commission to prescribe reasonable through routes and joint rates for joint rail-barge service. The order here involved was issued pursuant to powers given the Commission by Section 307 of the Interstate Commerce Act (49 U. S. C. 907) wherein it is provided that the Commission can, whenever deemed by it necessary or desirable in the public interest, establish through routes and joint rates applicable to the transportation of passengers or property by water and by rail. Paragraph (d) of said section specifically provides that:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified by the all-rail rates and joint rates in connection with such common carrier by water.[4]

[4] The Commission's order provides that rail carriers participating in the joint rates will receive the same division of such rate as they would from a joint all-rail rate. Therefore, in connection with the division to be received by the large lines, Section 307 (f) (49 U. S. C. 907 (f)) is pertinent in that it provides that the Commission shall give due consideration, among other factors, "to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed" as well as "to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service. * * *" This latter provision is similar to the

Additional statutory authority for said order is furnished by Section 3 (c) of the Inland Waterways Corporation Act (49 U. S. C. 141) which declares it to be the policy of Congress to continue the transportation service of the Inland Waterways Corporation until, among other conditions:

> * * * there shall have been published and filed * * * such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers.[5]

The order may properly be classed as an implementation of the National Transportation Policy incorporated in the Interstate Commerce Act wherein it is expressly stated to be the policy of Congress to require the Act be so adminis-

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so-called "Rule of Rate Making" in Section 15a (2) of the Act regarding rail carriers and was especially designed to protect water carriers and to prevent the public from being deprived of the low cost service furnished by them. 84 Cong. Rec. 6128.

[5] A current reiteration of the stated Congressional policy is set forth in Senate Report No. 1204, 81st Cong., 1st Sess., dated October 31, 1949, on Bill S. 211, amending the Inland Waterways Corporation Act. In explaining an amendment to the Act, the report states:

This section also amends subsection (c) of section (3) of the Act. * * * The amendment, however, repeats the previous declaration of policy as contained in the original act *and is so repeated so that there can be no question as to the intent of Congress to have the declaration of policy including establishment of joint tariffs with rail carrier carried through to fruition.* [Italics supplied.]

tered as to recognize and preserve the inherent advantages of each mode of transportation subject to the provisions of the Act (49 U. S. C., notes preceding sections 1, 301, 901 and 1001).

By this appeal twenty-seven railroad appellants, representing themselves as well as all other rail carriers similarly situated, seek this Court's review of matters earlier considered in detail by the Commission and the District Court and found lacking in substance and merit.

Reduced to its simplest form, this appeal challenges the power of the Commission to prescribe joint rail-barge rates (differentially) lower than all-rail rates between the same points unless the Commission makes a finding that the operating costs on such joint rail-barge routes are lower than the costs for all-rail service. The appeal seeks a ruling by this Court that such a finding is a prerequisite to Commission action fixing joint rail-barge rates despite the fact that the Commission found that at the time of its decision the only cost data before it was hopelessly out-of-date and valueless for the purpose intended, covering as it did the 1933–38 period. (270 I. C. C. 591, 604.) It is equally apparent that such contention seeks to make a carrier's operating costs the exclusive "yardstick" in the determination of its transportation rates. Even a cursory examination of appellants' Assignment of Errors and Jurisdictional Statement discloses the complete dependency of appellants on the proposition

briefly stated above—that operating costs are the sole determining factor in the calculation of freight rates. This proposition was the keynote of appellants' case before the Commission and before the District Court, and is now relied upon as the basis for reversal of the earlier administrative and judicial decisions. In addition, appellants attack generally the sufficiency of findings and evidence to support the quantum of rates prescribed.

Brief reference to the Commission's report (270 I. C. C. 603) will show that appellants from the outset of the Commission's investigation sought to prevent prescription of joint rates less that all-rail rates, urging justification for such contention to be the absence of any economy based on cost of service in favor of the joint service. The Commission specifically states that:

> Approximately one-fourth of the record deals with cost of transportation service by rail and barge. At the outset of the hearings the railroads announced their intention of showing "that the cost of transporting freight by barge-and-rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge-and-rail routes" contrary to the view theretofore widely held, and frequently expressed that water transportation, including that performed by the barge lines,

> is inherently cheaper, as a general proposition, than rail transportation. Federal and Valley accepted the challenge in this assertion. (270 I. C. C. 591, 603.)

Independent of the alleged conclusive character of the "cost of service" factor as determinative of transportation rates generally, attention must be directed to the value of the factual data in this regard placed before the Commission. As stated by appellants in their Jurisdictional Statement, all cost data placed before the Commission by the barge and rail carriers was referred for study to the Cost Section of the Commission's Bureau of Transportation, Economics and Statistics, and at one of the hearings a restatement of rail and barge cost data with supporting details was introduced in evidence by members of the staff of the Commission's Cost Section, who reached the general conclusion quoted by the Commission in its report that:

> * * * the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic. (270 I. C. C. at p. 604.)

The Commission's investigation was instituted in 1934, hearings were concluded in 1943, a record of over 16,000 pages of testimony and over

1,500 exhibits was developed, and its principal report was entered on July 7, 1948.[6] As admitted by appellants in their Jurisdictional Statement:

> Because of changes in conditions which had taken place subsequent to the period 1933–8 covered by the cost studies, the Commission did not make a specific finding of the relative all-rail and barge-rail costs during the period 1933–8.

The Commission's statement in this regard was:

> Testimony in the nature of comment on the restatement of the cost section was received from respondents, who also filed supplemental briefs setting forth their criticisms of the restatement and the supporting data. No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933–38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail. (270 I. C. C. 591, 604.)

Following this observation, the Commission noted some of the changes in conditions affecting barge service and operating costs and concluded that:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail trans-

[6] The Commission entered a Supplemental Report on June 13, 1949 (274 I. C. C. 229), containing minor modifications of its earlier report.

> portation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials. (270 I. C. C. 606.)

The Commission directly met the challenge of the rail carriers as to the insufficiency of its findings on cost of service by noting that:

> * * * in a number of our earlier reports dealing with the question of barge-rail differentials, * * * we stressed lower cost of barge service as an important reason for such differentials, but in no instance did we decline to prescribe or approve differential rates because the economy thereof had not been affirmatively shown. Furthermore those decisions antedated the enactment of Section 307 (d). Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is such an affirmative showing. (270 I. C. C. 611.)

Earlier decisions of the Commission attest to the accuracy of the statement that transportation rates are not controlled by nor made with an eye to operating costs. *Consolidated Southwestern Cases,* 123 I. C. C. 203, 374; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.,* 155 I. C. C. 691, 696–7; *Switching Rates in Chicago District,* 177 I. C. C. 669, 705; *Lighterage Cases,* 203 I. C. C. 481, 510; *Proposed Lake Erie-Ohio Canal,* 235

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I. C. C. 753, 761; *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, 510–11. This Court has also sustained the Commission's conclusions in this regard, *New York* v. *United States,* 331 U. S. 284, 328; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500.

It was in the light of these authorities that the District Court appropriately concluded:

> * * * plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

Perceiving directly the basic error in appellants' reasoning, the District Court stated:

> In the instant case, assuming that the operating costs of the railroads are less than those of the barge lines, it does not follow that joint barge-rail rates should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads,

which provide to the shipper a far superior service. More important, then, than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carrier and the operating costs incurred by the water carriers. So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating costs and all-rail rate, is lower than that prescribed for the superior service. Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i. e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist.[7] In the joint rates established, the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

In addition, the District Court in construing the statutory power of the Commission under Sec-

[7] In a footnote, the District Court illustrated the faulty reasoning of appellants by observing:

Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor.

tion 307 (d) to prescribe lower rates for rail-barge service held:

> The statutory provision empowering the Commission to prescribe differentials (Section 307 (d) of the Transportation Act of 1940) does not make the exercise of this power conditional on an affirmative showing of lower operating costs, but directs that "* * * the Commission shall prescribe such reasonable differentials as it may find to be justified * * *." As the Commission stated in its report, "Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is * * * an affirmative showing (of lower operating costs)."

Appellants' reliance upon *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, as support for their position, is also without merit. That controversy presented the factual situation where a rail carrier sought to exact for similar service a higher rate from one class of shippers than from another. This Court held:

> To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain. * * * The unsifted averages put forward by the Commission do not measure the allegedly

> greater costs nor indeed show that they exist. (330 U. S. 567, 583.)

This ruling when applied to the situation presented by the instant appeal—where all cost data relied upon by the appellant rail carriers was properly rejected as "stale" by the Commission—clearly shows that such data cannot, no more than could the "unsifted averages" in the *Mechling* case, be used as the basis for computing competing freight rates.

Nor can it be held, and we do not understand appellants to so contend, that the *Mechling* case stands for the proposition that a structure of rates applicable to competing forms of transportation must be computed in direct relationship to operating costs, even if the same were accurately established.

The instant case implements the doctrine of the *Mechling* decision in that the rates prescribed preserve the availability of cheaper (but inferior) water transportation service to the shipping public at cheaper rates for the inferior service, because without some advantage of rates to users of water transportation service, the result would be, as found by the District Court, "to end effectively all barge-rail traffic."[8]

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[8] And in the same light:

> * * * insofar as the inherent cheapness of the barge leg of the through route produces a disparity between barge-rail rates and local rail rates, Congress has said that the Act must be so administered as to preserve, not eliminate or reduce the disparity. (330 U. S. 567, 580.)

It is also submitted that the District Court's decision, together with its findings of fact which more fully reviews the evidence before the Commission, adequately disposes of any contention by appellants concerning the alleged insufficiency of evidence to support the findings made by the Commission. The District Court found contrary to what is contended by appellants, that

> Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission.

The District Court further found that while appellants asserted it was impossible to determine how the specific differentials were arrived at, again the Commission's report indicated otherwise, and that comprehensive proposals for the establishment of differentials were submitted and considered in detail by the Commission. The District Court concluded that:

> From the foregoing discussion, it would seem apparent that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject. (*Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, 592).

For the foregoing reasons, it is evident that this appeal presents no question requiring independent review of the convincing decision of the District Court. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed on motion.

DANIEL W. KNOWLTON,
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EDWARD M. REIDY,
Associate Chief Counsel,
For Interstate Commerce Commission.

MARCH 21, 1950.

CERTIFICATION OF SERVICE

I certify that a copy of the foregoing motion to affirm was served on counsel for all parties of record by mail this 21st day of March 1950.

EDWARD M. REIDY,
Associate Chief Counsel,
For Interstate Commerce Commission.

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